

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel. W.A. DREW)
EDMONDSON, in his capacity as ATTORNEY)
GENERAL OF THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C. MILES TROBERT, in his)
capacity as the TRUSTEE FOR NATURAL)
RESOURCES FOR THE STATE OF)
OKLAHOMA,)

Plaintiff(s),)

vs.)

TYSON FOODS, INC., INC., TYSON POULTRY,)
INC., TYSON CHICKEN, INC., COBB-)
VANTRESS, INC., AVIAGEN, INC., CAL-MAINE)
FOODS, INC., CAL-MAINE FARMS, INC.,)
CARGILL, INC., CARGILL TURKEY)
PRODUCTION, LLC, GEORGE'S, INC.,)
GEORGE'S FARMS, INC., PETERSON FARMS,)
INC., SIMMONS FOODS, INC., and WILLOW)
BROOK FOODS, INC.,)

Defendant(s).)

Case No. 05-CV-329-TCK-SAJ

ORDER

Currently before the Court is Plaintiffs' Motion for Entry of Proposed Confidentiality Order and Brief in Support. [Docket No. 573]. Plaintiffs' motion is granted in part and denied in part, as further detailed in this Order. The parties should submit a joint confidentiality order to the Court for signature which complies with this Order. If additional issues need to be addressed by the Court with regard to the confidentiality order, the parties should file a motion.

The Court has considered the arguments of the parties, the case law submitted by the parties, and the confidentiality orders submitted by the parties. In reaching this

decision, the Court is cognizant of LcvR 79.1(a) which recognizes that confidentiality orders are disfavored. The Court additionally notes that, in this lawsuit, Plaintiffs have sued several Defendants who are competitors. The Court concludes that a confidentiality order should be entered in this case.

Two-Tiered System Appropriate

Defendants request a two-tiered confidentiality system to which Plaintiffs object. Plaintiffs additionally contend that the definitions proposed by Defendants are insufficient.

The Court concludes that the two-tiered confidentiality protection requested by Defendants is appropriate. However, Defendants' proposed confidentiality order does not contain a definition of "confidential." Defendants' "Confidential – Attorneys Eyes Only" designation is defined as "documents or other items which, if disclosed to a competitor may cause material injury to the disclosing party." Defendants do not otherwise define what documents may be appropriately classified as "Confidential." Plaintiffs propose the "Confidential" designation as permissible for "documents [that] contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information." The Court concludes that defining the categories of documents or items that can be designated as confidential is appropriate, and finds that Plaintiffs' definition for those items designated as "Confidential," is acceptable. The "Confidential – Attorneys Eyes Only" designation is limited to those documents meeting the definition proposed by Defendants, which is those "documents or other items which, if disclosed to a competitor may cause material injury to the disclosing party."

Modified Attorney Certification Permissible

Plaintiffs request an attorney certification or affidavit for each documents that is designated as confidential. Defendants object to the proposed certification as unduly burdensome and unnecessary.

The Court takes a parties' representation that a document is confidential and entitled to protection pursuant to a protective order as the representation of the attorney that the attorney has reviewed and concluded that the document should be protected. However, given the number of attorneys for each party that have entered an appearance in this Court, and given the number of attorneys actively involved in this litigation, the Court is cognizant of the fact that identifying the particular attorney who reviewed the document can be problematic. The Court will therefore require, in addition to the "Confidential" or "Confidential – Attorney's Eyes Only" stamp on each document, an indication within or near the stamp of the name of the attorney who has determined that the document should be designated as "Confidential" or "Confidential – Attorney's Eyes Only." The Court will not require a separate affidavit for each document. The Court will not require that the attorney who determines that the document is deserving of a confidential classification personally write his or her name on the document. However, for each document that is designated as "Confidential" or "Confidential – Attorney's Eyes Only," the Court will require the name of the attorney who has made the designation on that document,^{1/} or on an attached sheet

^{1/} The parties are free to adopt any system that is convenient. If a party prefers to designate one attorney who will, for that party, be the attorney that has designated the documents as "confidential," that is permissible. Similarly, it is permissible for a party to write the name of the attorney on the face of the confidential document. The Court does not, by this requirement, intend to impose an arduous burden on the parties, but merely intends to insure that: (1) a party challenging the confidential designation knows who to contact, and (2) the Court knows who to hold responsible for designations.

if that is more convenient for the parties. The Court additionally requires that the name be legible.

Court Will Not Modify the Burden of Proof

Defendants propose, with no authority, that the Court shift the burden of proof with respect to proving that a document should retain confidential classification. Plaintiffs note that this would be to Plaintiffs' detriment because Plaintiffs believe that Plaintiffs will have less documents than Defendants that are confidential. Plaintiffs also maintain that this is contrary to the generally prevailing case law on burdens of proof with respect to confidential documents.

The Court is not persuaded that any shift in the burden of proof is warranted. A party that maintains that a document should be considered confidential has the burden of proof with regard to that parties' position.

Plaintiffs also suggest a unique procedure for the challenging of the confidential classification. Plaintiffs maintain that the party who claims that the document is confidential should, within fifteen days of written dispute of the confidential nature of the document, move for an order confirming the confidential designation. Defendants object to Plaintiffs' proposal. The Court is not persuaded to change from the traditional method of having the party that challenges the confidential classification file a motion with the Court. This method permits that party challenging the classification to file the initial brief and a reply brief which is helpful to the Court. None of these provisions should be taken as relieving the parties from compliance with the meet and confer requirements of LcvR 37.1.

The Court intends by this Order, to address the issues which the parties presented as areas in which the parties could not reach an agreement. Given the rulings of the Court, the parties should work together to reach an agreed confidentiality order, and submit that agreed to order to the Court for signature. If the parties are unable to reach agreement with respect to the confidentiality order, the parties should file a motion or motions with the Court. In the motion(s) the parties should, submit a proposed confidentiality order in Word or WordPerfect format and identify all remaining areas of disagreement and specify the language upon which the parties are unable to reach agreement. Each party that has an issue to present to the Court should submit a proposed confidentiality order to the Court.

Dated this 15th day of August 2006.


Sam A. Joyner
United States Magistrate Judge